91-1980

Supreme Court, U.S.
FILED
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAVID E. CARLSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Neil MacFarlane
7907 Zenobia Street
Westminster, CO 80030
(303) 428-6971

QUESTION PRESENTED

Whether the District Court erred in denying Appellant's Motion for Relief Pursuant to 28 U.S.C. Section 2255 based upon ineffective assistance of counsel due to a conflict of interest between Appellant and trial counsel.

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David E. Carlson v. United States
90-1094 (10th Cir. filed March 30, 1990)
United States of America v. Carlson,
91-1113 (10th Cir. filed January 17, 1992).

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID E. CARLSON,	)	
	)	
Petitioner,	)	No. 91-1113
	)	(Tenth Circuit
v.	)	Case Number)
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF CERTIORARI

Petitioner, David Carlson, through his counsel, Neil MacFarlane, for his Petition for Writ of Certiorari, states to the Court as follows:

Reference to Opinion.

The petition seeks review of the Judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court's denial of Petitioner's Motion pursuant to 28 U.S.C. Section 2255. The opinion of the Tenth Circuit is found in United States of America v. Carlson, 91-1113 (10th Cir. filed January 17, 1992).

A copy of the slip opinion is appended hereto as Exhibit 1.

Jurisdictional Statement.

The judgment of the United States Court of Appeals for the Tenth Circuit was filed on January 17, 1992. Jurisdiction in the Supreme Court is conferred by 28 U.S.C. Section 1254(1).

Statutes and Rules.

28 U.S.C. Section 2255.

Statement of the Case.

Appellant David Carlson was found guilty of mail fraud and equity skimming by the Honorable John Kane following a bench trial. His conviction was affirmed on appeal. United States v. Carlson, 88-1294 (10th Cir. June 19, 1989).

Thereafter, Appellant sought relief in the United States District Court for the District of Colorado pursuant to 28 U.S.C. §2255. The case was assigned to the

Honorable Jim Carrigan.[1] Judge Carrigan ordered the Government to file a response. Following such response, Judge Carrigan denied the 2255 Motion on January 18, 1990. Appellant appealed the denial of such Motion to the Tenth Circuit. On Motion of the Government, the Tenth Circuit remanded the matter to the District Court since, as the Government noted in its remand motion, Judge Carrigan had not articulated his reasons for the denial of the motion as required by United States v. Marr, 856 F.2d 1471 (10th Cir. 1988). Upon remand, Judge Carrigan set the matter for an evidentiary hearing. The hearing was held on December 28, 1990. The Court filed its Memorandum Findings of Fact and Conclusions of Law denying the motion on February 7, 1991.

[1] The Honorable Judge Kane at that point was no longer handling criminal or related matters.

Appellant's 2255 Motion was based upon the undisputed loss of evidence consisting of business records. Approximately one year before trial, Appellant brought to trial counsel's office containers of business records. These evidentiary records were to be used to support Appellant's primary defense of good faith. These evidentiary records were before trial mistakenly thrown out by the janitorial staff of the building in which trial counsel had his office. The loss of such defense evidence was not brought to the attention of the trial court by trial counsel until after the trial. As noted, there is no dispute that the evidence was lost.

Having had the opportunity for further reflection and review, the following issues were raised in Appellant's 2255 Motion, all of which relate directly to the undisputed loss of evidentiary business records: (a)

There existed such a conflict of interest between Movant and his Trial Counsel that he was denied the effective assistance of counsel; (b) the conflict of interest had an impact on and materially altered the evidence presented at Trial; (c) to sustain a waiver of conflict of interest, the record must show active participation by the Trial Court in such waiver; (d) the conflict of interest effectively rendered Movant's Trial a sham; and (e) the conflict of interest effectively deprived Movant of his right to a jury Trial in violation of the Sixth Amendment to the United States Constitution.

In support of the Motion, Appellant included affidavits of other counsel in the case, Mr. Neil MacFarlane and Ms. Vickie Mandell King, as well as his own and that of a former employee, Alreeta Eidson.

At the December 28, 1990 evidentiary hearing, numerous witnesses were called both

for Appellant and the Government. The following is a synopsis of the testimony of such witnesses.

Mr. Neil MacFarlane testified as follows: That he was Appellant's initial lawyer; in his view there were two conceivable defenses, first an economic defense and second a business records defense; in his opinion it was definitely a case to take to a jury; the records were extremely important; and Mr. Carlson was very upset when the evidence was lost.

Mr. Gary Crooks testified that: he was with the United States Probation Department; he prepared the pre-sentence report; to the best of his knowledge he was the first court official to be advised of the lost evidence.

Ms. Alreeta Eidson testified that: she had known Mr. Carlson for some time; he was a good record keeper; he brought his disbursement records to her home for her to

organize; there were at least 6,000 such records; at least 1/3 of such records reflected mortgage payments averaging $500 to $600 ($1,100,000.00); the records were too numerous for her to organize so they were taken to Mr. Keller's office; she later learned the business records were lost; they met with Mr. Keller; she never discussed her trial testimony with Mr. Keller; the loss of the records and not mentioning such loss to the Court altered the testimony she gave at trial; and she believed Mr. Keller was going to bring to the attention of the Court the lost records.

Mr. Alex Keller, trial counsel, testified that: he represented Mr. Carlson in the equity skimming case; Mr. Carlson did advise him that Mr. Carlson's business records had been thrown out apparently by the janitorial staff; he never saw the records; to the best of his knowledge, no one in his

office actually saw the records; he thought the records were a peripheral issue and doubted whether they would be admitted into evidence; he discussed his withdrawing from the case with Mr. Carlson; Mr. Carlson stated he wanted Mr. Keller to represent him; and they decided that a bench trial was the best strategy.

Mr. Robert Johnson, testified that he was an attorney in Mr. Keller's office; he did not see the records; Mr. Carlson described the records to him; they advised Mr. Carlson if they were to testify it may be necessary for the firm to withdraw; to the best of his recollection, Mr. Carlson did not testify about the lost records at trial; Mr. Carlson was very upset with the records that were lost; the lost records were very important to the defense; and the lost

records were not brought up at trial[2].

Mr. David Carlson testified that; he had always kept good records; he had two defenses, one an economic defense and the other one a good faith dollar-for-dollar business defense; there were in excess of 500 disbursement files and records which were essential to his defense, consisting of cashier checks and receipts and money order receipts, equaling over $500,000; he made such disbursements by cashier's checks and money orders because of a tax lien; Mr. Keller only reconstructed a small portion of those records at trial, approximately $12,000; his decision to go with a bench trial was only made when Mr. Keller told him some two weeks before trial that they would

[2] It is important to note that while Mr. Keller felt the records were a peripheral issue, Mr. Johnston - his co-counsel - felt they were very important to the defense. There obviously was a conflict between Mr. Keller and Mr. Johnson as to the importance of the lost evidence.

not bring up the missing records; that this was the reason he waived his right to a jury trial; and everything he testified to at trial was skewed. Ms.

Martha Horwitz testified that: she was a law clerk in Mr. Keller's office; she knew the records were brought to the office but did not see them; and she made numerous efforts to reconstruct the lost records through subpoenas.

Reasons Relied on for Allowance of the Writ.

A. This Court should grant this Petition to determine whether the Tenth Circuit properly rejected Petitioner's claim that the District Court erred in denying his Motion pursuant to 28 U.S.C. Section 2255.

This case presents an issue unparalleled in American jurisprudence. In no other case has an attorney through his agents lost

exculpatory evidence, remained silent, altered testimony at trial to hide such evidentiary loss and then only after being directly confronted with such loss after the conviction by the probation officer, admit that about one year prior to trial the attorney through his janitorial staff had lost the evidence.

Further, in no prior case has an attorney ever been allowed to continue to represent a criminal defendant having lost exculpatory evidence. Also, in no case has an attorney who has lost evidence been allowed to advise his defendant to waive his right to trial by jury while remaining silent about an evidentiary problem which could affect a jury's opinion of his defendant's credibility. The lower court's statement that the lost evidence had to do with properties outside those set forth in the indictment and that it was therefore not

relevant points out a very undisputed fact and that is that in trial counsel's opening statement, he referred to the indictment properties as the Government's strong properties and that the defendant was relying on other properties to support the defendant's position that he had not acted with criminal intent. It is submitted that other defendants have been acquitted on such a defense. Mr. Carlson had an absolute constitutional right to defend himself in a manner of his choosing, without the weight of his attorney's problems on his shoulders. In cases such as this if any defendant is limited to evidence of indictment property only, there would be no reason for trial on the issue of defendant's state of mind, that is intent. Here, the nonintroduction of lost evidence and the failure to bring to the attention of the trial court such loss subverted the truth.

Mr. Keller testified that the lost evidence was of no import to the defense. This statement at the evidentiary hearing was in direct contradiction to his own statements at the original trial and, further, was directly contradicted by the testimony of Mr. Robert Johnson, co-counsel in the trial court. Further, Mr. Keller testified that he advised Mr. Carlson to waive his right to trial by jury for strategic reasons when in fact this advise was based upon the decision not to bring to the attention of the trial court the lost evidence.[3] The lost evidence created a real and direct conflict of interest between trial counsel and Mr. Carlson.

The Sixth Amendment to the Constitution of the United States provides in pertinent part that "[i]n all criminal prosecutions the accused shall enjoy the right..." to have

[3] Mr. Carlson currently has pending against both Mr. Johnson and Mr. Keller a lawsuit arising out of the lost evidence.

the assistance of counsel for his defense. In Wheat v. United States, 486 U.S. 153 (1988), this Court cited with approval an opinion of the 9th Circuit that there are two counsel related Sixth Amendment rights: (1) the qualified right to be represented by counsel of one's choice and (2) the unqualified right to a defense conducted by an attorney who is free of conflict of interest. It is respectfully submitted that the later right is directly involved here.

Initially, it should be noted that most conflict of interest cases arise in the context of multiple representations of co-defendants by one attorney. Here, the conflict of interest existed directly between trial counsel and his client.

It is submitted that at the moment the defense business records were lost - crucial evidence of Appellant's good-faith defense - an actual and active conflict of interest

arose between Appellant and trial counsel. Trial counsel, at that point, had divided loyalties: his loyalty to his client and his loyalty to his own financial and professional interest. Trial counsel was paid a very substantial retainer. Appellant testified that he was unaware of any conflict of interest between he and trial counsel until after the trial. He claims that he was not informed, for example, that had he desired to call trial counsel as a witness to verify that the business records had been lost, trial counsel would be unable to represent him and would have to return the retainer. Moreover, it is Appellant's contention that had he been aware that he could have called trial counsel as a witness to verify the loss of records, he would not have waived his right to jury trial. Where trial counsel is unable to devote fully his skills because of

competing interest - in this case his own and his client's - a conflict exists.

It is Appellant's contention that the conflict was two-prong: First, as noted in his 2255 Motion, it caused him as well as Alreeta Eidson to alter their respective testimony at trial. Such alteration was required since the fact evidence in the form of business records had been lost was not brought to the attention of the trial court until after trial. Second, it created, as noted, competing interests between trial counsel's need to protect his own interests as opposed to those of his client.

As a result of the loss of such evidence, there were two theories that could have been presented. First, that Mr. Carlson applied funds to properties but without full evidence in the form of complete business records to support such theory, it was implausible that it would be believed.

However, Appellant could have presented testimony in support of such theory and the lost evidence had it been brought to the attention of the court prior to trial. The lost evidence would have shown expenditures on properties in excess of $1,000,000 rather than the paltry sum of $12,000 recreated at trial. This Honorable Court should definitively define standards for counsel who are responsible for lost evidence. Second - the theory that was presented by remaining silent on the issue of lost evidence that Mr. Carlson did not keep complete and accurate business records. The fact it was possible to reconstruct some of the lost evidence and to present such evidence to the court is unfair in the absence of an explanation as to the substantial portion of such evidence that was lost and not mentioned. Further, as Mr. Carlson testified at the hearing, since a majority of the records were cashier's checks

and money order receipts, reconstruction of such records was virtually impossible. Finally, it is clear that Appellant could not benefit by the false story that he did not keep business records, but rather only defense counsel could benefit from such false story. Trial counsel remained silent until confronted by Gary Crooks.

The 1989 American Bar Association Model Rules of Professional Conduct, rule 1.7 CONFLICT OF INTEREST, GENERAL RULE, provides in pertinent part:

> (b) a lawyer shall not represent a client if the representation of that client may be materially limited by "...the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation...."

The Supreme Court has acknowledged that the ABA rules may be looked at for the appropriate standards of conduct of counsel in a particular case. See e.g. Wheat v. United States, 486 U.S. 153 (1988); Nix v.

Whiteside, 475 U.S. 157 (1986); Strickland v. Washington, 466 U.S. 668 (1984).

The Code of Professional Responsibility adopted by the Supreme Court of Colorado provides, in pertinent part, as follows:

> (A) If after undertaking employment in contemplated or pending litigation a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101 (B)(1) through (4).

The Colorado Code of Professional Responsibility applies to all attorneys appearing in the United States District Court for the District of Colorado. See United States District Court for the District of Colorado, Local Rules of Practice, Appendix A.

In Strickland v. Washington, supra, this Court established a two prong test to

determine an ineffective assistance of counsel claim. The court held in pertinent part as follows:

> [F]irst the Defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the Defendant by the sixth amendment. Second, the Defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable.... Id at 687.

The Court went on to state, however, citing Cuylar v. Sullivan, 466 U.S. 335 (1980) that:

> [P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties... given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see e.g. Fed.Crim.Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Id at 692.

Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Cuylar v. Sullivan, supra, at p. 346. Moreover, it should be noted here that the right of a defendant to waive any conflict of interest is circumscribed by society's right to a error free public trial for an accused.[4] It is submitted that there is in this case a presumption of prejudice. This leaves us with the second prong of Strickland. Appellant would argue that the underlying premise of Strickland is fairness, i.e., if one knows of the conflict of interest and fails to object to such conflict at the appropriate time, such individual has a

[4]The Tenth Circuit has held that where a known conflict of interest exists, the trial court should be an active participant in any waiver. See e.g. United States v. Winkle, 722 F.2d 605, 611 (10th Cir. 1983).

higher burden to show a violation of the Sixth Amendment. However, where the Defendant is uninformed of a conflict, and where the Court is likewise uninformed of a conflict until after trial, the existence of such a conflict warrants the presumption of prejudice and a reversal, notwithstanding the second prong of Strickland. As stated by the Court in Zuck v. State, 588 F.2d 436, 439 (5th Cir. 1979), Cert. den., 444 U.S. 833 (1979).

> "If such an actual conflict exists, it need not be shown that the divided loyalties actually prejudiced the Defendant in the conduct of his trial. As we noted in Costillo 504 F.2d at 1245:
>
> When there is a conflict of interest such as exists in this case, the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps of exposing gross instances of incompetence, but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real, as it is here, a denial of the right to effective representation exists, without a showing a specific prejudice."

Respectfully submitted,

Neil MacFarlane

NEIL MacFARLANE
Attorney for Appellant
7907 Zenobia Street
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CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 14th day of May, 1992 I placed a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI in the United States mails, postage prepaid thereon addressed to:

Clerk of the United States
Supreme Court
1 First Street N.E.
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David Carlson
12031 West 44th Avenue
Wheat Ridge, CO 80033

Richard J. Banta

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 86 CR 209

DAVID E. CARLSON,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CARRIGAN, J.

Petitioner David E. Carlson commenced this habeas corpus action pursuant to 28 U.S.C. § 2255, seeking to set aside his conviction for mail fraud and equity skimming. In his petition, Carlson asserts that he was denied his Sixth Amendment rights to effective assistance of counsel and to a jury trial.

Carlson originally was indicted in the United States District Court for the District

of Colorado on fifteen counts of mail fraud, equity skimming and false statements. The government alleged that Carlson has assumed federally insured mortgages on various properties and, without paying or intending to pay the assumed mortgages, had collected rent on the mortgaged properties until their outstanding loans were foreclosed. Carlson pleaded guilty to all charges.

Trial to this court commenced on August 24, 1987, before Judge John L. Kane, Jr. On September 2, 1987, after eight trial days, Carlson was found guilty of nine counts of mail fraud and one count of equity skimming.

On October 16, 1987, Carlson was committed to the Attorney General's custody for observation and study pursuant to 18 U.S.C. § 3553(c). He was sentenced on February 19, 1988, to six months incarceration in a community corrections facility to be followed by five years

probation. He currently is on probation.

On February 26, 1988, Carlson appealed his conviction, arguing: (1) that his waiver of jury trial was invalid; and (2) that the judge's acceptance of that waiver without conducting a colloquy on the record required reversal or remand. By order and judgment dated June 19, 1989, the Tenth Circuit affirmed Carlson's conviction.

Carlson commenced the instant habeas corpus Action on October 25, 1989. Judge Kane was not available, and therefore the matter was assigned to me. I dismissed the complaint and action on January 18, 1990, and the petitioner appealed. On July 13, 1990, the Tenth Circuit remanded the case for further proceedings.

On December 28, 1990, I held a lengthy hearing on the matter, and the issues are now ripe for decision. Jurisdiction is based on 28 U.S.C. § 1331. This memorandum

constitutes my findings of fact and conclusions of law as required by Fed. R. Civ. P.52(a).

I. Findings of Fact.

Carlson hired attorneys Alex Keller and Robert Johnson to represent him at his criminal trial, paying them a $50,000 retainer in advance. As a defense, counsel intended to show Carlson's "good faith" intent and purpose to maintain the properties he had purchased and to pay off at least some of the mortgages.

Critical to that "good faith" defense were records of Carlson's expenditures. The records were not well organized, because at various times, Carlson would gather records and bring them in boxes to his attorneys' office for organization.

Carlson took one such set of records to his friend, Alreeta Eidson, to be organized by her. She found the task impossible.

Carlson retrieved those records, placed them in a paper bag, file folders and a beige kitchen-type wastebasket and brought them to his attorneys' office, placing them on or near a table in the office library. Unfortunately, those records were discarded by the office janitor.

Neither attorney Keller nor Johnson, nor any of their staff, saw the records prior to their disposal. None of them had any personal knowledge of the records' nature or contents.

About thirty percent of the records, by volume, may have been mortgage payment receipts. Those receipts, however, did not relate to properties on which Carlson's conviction for mail fraud was based. The remaining records may have related to maintenance disbursements on Carlson's properties.

Carlson consulted with both Keller and Johnson about the records' loss. On disputed testimony, I find that the attorneys indicated that they would be willing to testify at trial about the lost records, but explained that they would have to withdraw as counsel if they testified. They further indicated that the value of their testimony would be limited because they had never seen the records. Carlson chose to forego their testimony and instructed both Keller and Johnson not to withdraw but to remain as his counsel.

The attorneys attempted to "reconstruct" the lost records by requesting copies of them from the maintenance firms who had worked on Carlson's properties. At least some of the lost records were reconstructed. At trial, hundreds of documents reflecting Carlson's maintenance disbursements were offered into evidence and received.

Prior to trial, Carlson and his attorneys had discussed whether to waive his right to trial by jury. For tactical reasons, the attorneys suggested waiver. On July 16, 1987, Carlson informed his attorneys by letter that he wished to waive jury trial. On August 17, 1987, a written waiver of jury trial was filed with the court and the court granted the waiver on August 18, 1987.

II. Conclusions of Law.

In his petition, Carlson argues that he was denied effective assistance of counsel because a conflict of interest, arising when his records were lost, existed between himself and his attorneys, Keller and Johnson. He further argues that this asserted conflict of interest resulted in an invalid waiver of his right to jury trial.

The Code of Professional Responsibility, set out in the Colorado Revised Statues, governs the conduct of attorneys appearing in

the United States District Court for the District of Colorado. **See** Local Rule 306 and its Appendix A. Colorado Disciplinary Rule 5-102(A) provides, in pertinent part, that:

> "If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation, except that he may continue the representation . . . in the circumstances enumerated in DR5-101(B)(1) through (4)."

Colorado Disciplinary Rule 5-101(b)(1) provides that a lawyer who anticipates testifying at trial may continue representing a client "[i]f the testimony will relate solely to an uncontested matter."

The Colorado Code of Professional Responsibility further mandates ethical considerations for lawyers who may be called as witnesses. In point, Ethical Consideration 5-10 provides, in part, that:

> "It is not objectionable for a lawyer who is a potential witness to be an

> advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will related only to an uncontested issue."

Petitioner's argument is that his attorneys' continued representation after the records were lost created an:

> "undisclosed conflict [sic] [that] inefected [sic] any further attorney/client relationship. Trial counsel, at that point, had divided loyalties: his loyalty to his client and his loyalty to his own financial and professional interest." Petitioner's brief, p.5.

I am persuaded by the testimony and other evidence presented at the hearing that no actual or potential conflict of interest arose between Carlson and his attorneys. Disciplinary Rule 5-102(A) directs a lawyer to withdraw from representation only if it is **obvious** that he or she **ought** to be called as the client's witness. That was not the circumstance here.

First, Carlson's attorneys had not seen the records, had no knowledge of their

content and, indeed, could have testified only that they had **heard** that records had been lost. Such testimony would have been probative of no fact that even arguably could has assisted the defense, and, in any event, would have been inadmissible as hearsay, assuming timely objection.

Second, it is clear that, even if they or their staff had testified, Carlson's attorneys could have continued representation consistent with the requirements of Disciplinary Rule 5-101(b)(1) and Ethical Consideration 5-10 because that testimony would have related solely to matters that could not have been contested by the government.

Moreover, it is apparent that the attorneys' testimony would have been irrelevant because it could not have been probative of any factual issue. Indeed, I perceive no reason to believe that the

testimony, or even introduction of the lost records themselves would have effected the trial's outcome in any way.[1] No witness at the hearing, including the petitioner, testified credibly about the contents of the lost records. Moreover it is clear that any lost mortgage payment receipts would have been irrelevant, because Carlson's conviction related soley to properties on which he conceded that no mortgage payments had been made. Similarly, many maintenance disbursements records were introduced at trial and several maintenance personnel testified on Carlson's behalf. Thus it cannot be said that the lost records, as evidence, would have been anything other than irrelevant or cumulative.

After thorough review and consideration of the evidence and testimony offered at the

[1] In that observation, I concur with the conclusions that Judge Kane expressed at the petitioner's sentencing hearing. See Tr. Sentencing Hearing, 10/16/87, p. 8 and the government's hearing brief, p. 6.

hearing, I find and conclude that Carlson's attorneys complied with their professional responsibilities and that no conflict of interest arose between the petitioner and his trial counsel. I therefore hold that the petitioner was not denied effective representation of counsel. Because Carlson's argument regarding the invalidity of his jury trial waiver is dependent on a finding that a conflict of interest existed, I further hold that his right to jury trial was not improperly denied.

Accordingly, IT IS ORDERED that:

(1) the petitioner David E. Carlson's habeas corpus petition filed pursuant to 28 U.S.C. § 2255 is denied; and

(2) the petitioner's complaint and action are dismissed.

Dated at Denver, Colorado February 7, 1991.

BY THE COURT:

JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Richard J. Banta, Esq.
303 E. 17th Ave. #700
Denver, CO 80203

William Pharo, Esq.
Assistant U.S. Attorney

_____
Deputy Clerk

Dated: February 7,1991

re: 89-C-1860, 86-CR-209

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Nos. 90-1094
	)	&
v.	)	(D.C.No.89-C-1860)
	)	(D. Colo.)
DAVID CARLSON,	)	
	)	
Defendant-Appellant.	)	

ORDER AND JUDGMENT*

Before LOGAN and BARRETT, Circuit Judges, and KELLY, ** District Judge.

**Honorable Patrick F. Kelly, District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, the panel has determined unanimously that oral argument would not materially

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

assist the determination of these appeals. See Fed. R. App. R. 34(a) ; 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

Defendant David E. Carlson was originally indicted in federal court on fifteen counts of mail fraud, equity skimming, and making false statements to the Department of Housing and Urban Development. Following eight days of trial to the court, Defendant was convicted of nine counts of mail fraud and one count of equity skimming. Defendant appealed his conviction, claiming that his waiver of jury trial was not made voluntarily, knowingly, or intelligently. This court, in an unpublished order and judgment, No. 88-1294, affirmed his conviction in June, 1989. Defendant now appeals the district court's denial of his Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255,

asserting that, in his conviction for mail fraud and equity skimming, he was denied his constitutional rights to effective assistance of counsel and a trial by jury. We affirm.

Defendant was involved in approximately two hundred real estate transactions in which he purchased properties by assuming existing nonqualifying, government insured VA or FHA loans. He made these purchases in his own name and in the names of various nominees. By Defendant's own admission, he planned to pay off the assumed mortgages and make a profit by "buying low and selling high." The real estate market in the Denver area did not cooperate and Defendant's properties went into foreclosure, costing the government in excess of $1,000,000 in mortgage insurance payments. A majority of the properties were rented or leased out. Defendant collected approximately $500,000 to $600,000 in rents over the period of time in question.

However, no mortgage payments were made on the properties implicated in the indictment.

Defendant now claims that his trial attorneys, Alex Keller and Robert Johnson, had a conflict of interest which deprived him of effective assistance of counsel. Defendant states that one year prior to trial he delivered a plastic trash container full of business records to his attorneys' office and left it in the firm conference room. Apparently, the office janitors discarded the contents of the container, thinking it was refuse. Defendant claims that these records contained proof that he had expended collected rent monies on repairs and maintenance of the properties and would therefore support a good faith defense to the charges. Defendant claims that this loss of records created a conflict of interest which deprived him of effective assistance of counsel and severely prejudiced his defense.

Defendant makes conclusory allegations such as, he and Ms. Alaretta Eidson, a defense witness, could have "testified differently," the loss of the records caused his trial to be "a sham," the loss of the records was the reason he "waived his right to a jury trial," and "everything he testified to at trial was skewed." Appellant's Br. at 5.

"While we review de novo the district court's determination of whether an actual conflict existed, the court's resolution of the underlying facts giving rise to its conclusion is subject to a clearly erroneous standard of review." United States v. Suntar Roofing, Inc., 897 F.2d 469, 480 (10th Cir. 1990)(citing United States v. Soto Hernandez, 849 F.2d 1325, 1328-29 (10th Cir. 1988)). Defendant presented no Sixth Amendment objection at his trial. Therefore, we can only disturb his conviction "if he demonstrates 'that an actual conflict of

interest adversely affected his lawyer's performance.'" United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990)(quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)).

In order to establish ineffective assistance of counsel, Defendant must show (1) that counsel's performance was deficient, and (2) that the deficiencies prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Where it is alleged that defense counsel has a conflict of interest, there are special considerations which apply. United States v. Winkle, 722, F.2d 605, 609 (10th Cir. 1983). "'[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.'" Id. (quoting Cuyler, 446 U.S. at 349-50). In order to establish "'the constitutional predicate'" for a claim of

ineffective assistance of counsel, Defendant must "'show[] that his counsel actively represented conflicting interests.'" Soto Hernandez, 849 F.2d at 1329 (quoting Cuyler, 446 U.S. at 350). We agree with the district court's determination that no actual conflict existed.

Mr. Keller avers, and Defendant does not refute, that he had no knowledge of the contents of the plastic trash container except as recounted to him by Defendant. Appellee's App. at 53-54. Mr. Johnson and the firm law clerk, although both actively working on Defendant's case, also did not see or examine the business records prior to their loss. Appellee's App. at 77-78, 143-44. It appears to be undisputed that, following the loss of the records, Mr. Keller discussed with Defendant the possibility that he may have to withdraw from the case if he would be called upon to testify regarding the

loss of the documents. Appellee's App. at 58, 165. Defendant apparently expressed his desire to have Mr. Keller remain as counsel. Id. at 58. "An ineffectiveness-due-to-conflict claim is waived if defendant 'consciously chose to proceed with trial counsel, despite a known conflict to which the defendant could have objected but chose to disregard.'" Moore v. United States, No. 91-7083, slip op. at 9 (10th Cir. Dec. 1, 1991)(quoting Winkle, 722 F.2d at 612 n.12). A determination of whether Defendant effectively waived the alleged conflict is unnecessary, however, in light of our ultimate determination that no conflict existed.

Ms. Eidson testified that she had the documents in her possession for a short period of time for the purpose of sorting and organizing, but subsequently did very little with them due to the volume and

disorganization of the records. Appellee's App. at 33-36. She accompanied Defendant when he took the documents to Mr. Keller's office. It appears from the record, that Ms. Eidson could have testified to the existence of the documents, but the record reveals no indication that she would have been able to testify with any large degree of specificity as to the contents of the documents or to their relativity to the transactions under indictment. Defendant, himself, testified that the documents evinced repairs and maintenance cost outlay on various properties, but that none of the documents established costs attributable to maintenance of the specific properties implicated in the indictment. Appellee's App. at 137.

The Colorado Code of Professional Responsibility states:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake

the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Colorado Code of Professional Responsibility DR 5-101(B) (1990). It appears counsel's projected testimony verifying a loss of the business records would have been uncontested as no one has refuted Defendant's belief in the existence of the documents, nor that the container of documents was delivered to counsel's office. We can ascertain no evidence available to the government which would have refuted these facts. It is our

conclusion that counsel's testimony would have been only incidental to the defense, and even if it had been offered, it would not have created in identifiable conflict of interest mandating withdrawal.

If the evidence in the plastic trash container had been available and admissible, it allegedly would have shown that Defendant applied rent monies to maintenance and upkeep on certain properties. Defendant was not on trial for failure to maintain and repair the properties, however, nor was he accused of a failure to keep accurate records. His conviction was based on evidence that he assumed loans on government insured properties, collected rents and lease payments on the properties, and failed to make mortgage payments after the loan assumptions. He can point us to no evidence contained in the lost business records which would refute these facts. As the district

court judge stated upon learning of the loss at the sentencing phase of the trial,

> Mr. Carlson, while you place great importance in your statements about the loss of these documents, let me tell you it's not the enormity of the money which you spent on repairs or how little you spent on repairs that concerns me in this case, it's the enormity of the amount of money that was taken that was lost by other people. . . [Y]our attorney in this case gave you the best defense possible, and I don't think that those documents in the waste basket that were lost would have had any affect at all on my judgment.

Appellee's App., Tr. of Sentencing Hr'g at 7-8. It is our conclusion that the district court was correct in assessing the importance of the lost documents to be minimal.

Defendant argues that the conflict was "two-prong[ed]." First, he contends that the conflict caused him and Alareeta Eidson to testify differently than they would have had the documents been available, and second, that the loss of the documents created competing interests between trial counsel's need to protect his own interests as opposed

to those of his client." Defendant cannot specify, however, the testimony which would have been elicited if the documents had been available as opposed to the testimony that was given. His first allegation is therefore conclusory and without merit. It is Defendant's belief that the reason his counsel did not bring the lost records to the attention of the court was to protect his retainer and fees which would have to be returned in the event of withdrawal. There is nothing in the record, however, to support this contention.

Defendant further contends that if he could have called trial counsel as a witness to testify to the loss of the records, he would never have waived his right to a jury trial. The record indicates that Defendant's decision to waive a jury trial was a strategic decision based upon counsel's advice that perhaps the court would be in a

better position to understand the complexities of the case. Defendant's letter to counsel, Appellant's App. at 52-53, evinces his understanding and acceptance of this strategy.

In Bowie, 892 F.2d at 1500, we held that "defense counsel's performance was adversely affected by an actual conflict of interest if a specific and seemingly valid or genuine alternative strategy or tactic was available to defense counsel, but it was inherently in conflict with his duties to others or to his own personal interests." The purpose of the Sixth Amendment's guarantee of the effective assistance of counsel is not to assure the quality of legal representation, but only to ensure that defendants receive a fair trial. Strickland, 446 U.S. at 689. Defendant was given every opportunity to present his case to the judge. He called all the witnesses he wanted and introduced

hundreds of documents into evidence. Mr. Keller testified that the firm attempted to reconstruct as many of the lost records as possible, and called as witnesses all the parties named by Defendant as providers of repair and maintenance services. Appellee's App. at 57-58. The evidence missing from the trial, which would have provided the best evidence of good faith, was documentation proving mortgage payments. It is undisputed, however, that this kind of evidence did not exist.

We cannot say that defense counsel's performance was adversely affected by any identifiable conflict of interest under the facts here presented. There is nothing to indicate that a different attorney representing Defendant, and having the benefit of the testimony of Mr. Keller regarding his very limited knowledge of the loss of the business records, would have

conducted Defendant's defense differently or more competently.

Therefore, the judgment of the United States District Court for the District of Colorado is AFFIRMED. Defendant's Motion for Oral Argument is DENIED.

Entered for the Court

James E. Barrett
Senior Circuit Judge